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# Witness Preparation: Regulating the Profession's "Dirty Little Secret"

by ROBERTA K. FLOWERS\*

Every day in courthouses and attorneys' offices across the nation, both prosecutors and criminal defense attorneys interview witnesses for the purpose of preparing them to testify at hearings, depositions, and trials. Witness preparation<sup>2</sup> is considered by most criminal

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1. I first noted this description of witness preparation in Roberta K. Flowers, *What You See is What you Get: Applying the Appearance of Impropriety Standard to Prosecutor*, 63 MO. L. REV. 699 (1998). See Jeffrey L. Kestler, *Questioning Techniques And Tactics* 9.04, at 494 (2d ed. 1992) (noting that "there is nothing dirty about witness preparation," but acknowledging that routinely lawyers must convince witnesses that there is nothing unethical about the procedure); Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 829 (2002) (witness coaching is described as being the dark or dirty secret of the U.S. justice system); Bennett L. Gershman, *How Juries Get it Wrong—Anatomy of the Detroit Terror Case*, 44 WASHBURN L.J. 327, 349 (2005); Liisa Renée Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 Rev. Litig. 135, 136 (witness preparation is the dark secret). See also John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 309 (1989) (wherein witness preparation was called the professions "dark little secret").

2. Here, witness preparation refers to the method used by a lawyer to discuss the witness's actual testimony prior to their testimony. Some practitioners call this process "horse shedding" or "wood shedding," referring to the historical use of carriage houses behind the courthouse for last minute witness preparation. See JAMES W. MCELHANEY, *TRIAL NOTEBOOK* 50 (3d ed. 1994); *State v. Earp*, 571 A.2d 1227, 1234–35 (Md. 1990); Felicia Carter, *Court Order Violations, Witness Coaching, and Obstructing Access to Witnesses: An Examination of the Unethical Attorney Conduct that Nearly Derailed the Moussaoui Trial*, 20 GEO. J. LEGAL ETHICS 463, 468–69 (2007). Witness preparation is distinguished from investigation and discovery. During the investigation and discovery stage of the case, the lawyer is gathering facts and determining the strategy of the case. By the time the lawyer is at the pre-trial witness preparation stage, he should know all the facts of the case better than all the witnesses and should have determined his trial strategy and theory. See Flowers, *supra* note 1; Roberto Aron & Jonathan L. Rosner, *How to Prepare Witnesses for Trials* 12.01, at 212–13 (1985) (Professors Aron and Rosner divide preparation into three stages: the preliminary interview, preparation session, and the rehearsal session).

attorneys<sup>3</sup>—prosecutor and criminal defense attorneys alike—to be an essential part of trial advocacy. Most American lawyers would laugh at the suggestion that witness preparation should be prohibited.<sup>4</sup> American lawyers<sup>5</sup> assert that witness preparation is an essential step in zealous representation.<sup>6</sup> This paper addresses the ethical restraints on this common practice. It will look at whether the ABA Model Rules of Professional Conduct and/or the proposed ABA Criminal Justice Standards give sufficient regulation and guidance. It will then suggest several factual scenarios where the

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3. References to criminal attorney throughout this paper will include both prosecutors and defense attorneys.

4. Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1136 (“[O]ur system of presenting evidence at trial presupposes advance preparation.”); Janeen Kerper, *Preparing a Witness for Deposition*, 24 Litigation at 11 (1998) (witness preparation is a tradition in the U.S.). See also *Riboni v. District Court*, 586 P.2d 9, 11 (Colo. 1978) (recognizing that the American criminal justice system requires witness preparation).

5. Although witness preparation is an expected, widespread practice in the United States, it is not an accepted practice throughout the world. In many countries, the trial attorney never speaks to the witnesses. See William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT’L L. 37, 43 (1996) (comparing the American system with the system in Germany, where the “shaping of witness testimony” is considered unethical). In discussing the English system of witness preparation, Barrister Michael Hill states that the reason for the English rule prohibiting barristers from preparing witnesses before trial is to ensure that the witness’s testimony is the “testimony of the witness and not the result of the advocate’s interrogation of the witness in circumstances in which the witness is liable to seek to adopt the advocate’s perception of the events rather than his own recollection.” Michael Hill, *Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices*, 7 GEO. J. LEGAL ETHICS 865, 869 (1994). See generally DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (contrasting the German system which discourages contact between the witness and attorney); R. Doak Bishop & Brian J. Hurst, *Strategic Considerations When Representing Clients in International Litigation*, 2001 BUS. L. INT’L 69, 69–70 (2001) (in many countries it is improper for lawyers to talk to witnesses before testifying); Elaine Lewis, *Witness Preparation: What Is Ethical, and What Is Not*, 36 No. 2 Litigation at 41–42 (2010) (many foreign countries have banned witness preparation); Kerper, *supra* note 4, at 11 (witness preparation is a tradition in the U.S.).

6. Applegate, *supra* note 1. See *Riboni*, 586 P.2d at 11 (acknowledging the prosecution’s duty to prepare witnesses); Salmi, *supra* note 1, at 136–37 (a lawyer who does not prepare his witness would be derelict; avoiding perjury and representing a client zealously is a fine line in witness preparation); Nicole LeGrande & Kathleen E. Mierau, *Witness Preparation and the Trial Consulting Industry*, 17 GEO. J. LEGAL ETHICS 947, 950 (2004); Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 145 (2003) (some suggest that witness preparation is required to be a zealous attorney); *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (implying that an attorney has the right and the duty to prepare a client for deposition). See generally MODEL RULES OF PROF’L CONDUCT R. 1.3 (1996) (requiring that an attorney act with “reasonable diligence” in representing a client).

current standards and rules give very little guidance. Finally, this paper proposes two standards that might provide some guidance in this important area of trial preparation that is routinely practiced, hidden from view, and many times difficult to expose.<sup>7</sup>

## **I. Witness Preparation Practiced Daily, Rarely Talked About**

Although witness preparation is an accepted practice in criminal law, some worry that what occurs in witness preparation may be harmful to the search for truth. Professor David Luban observed: “[T]he interviewing and preparation of witnesses . . . is a practice that, more than almost anything else gives trial lawyers their reputation as purveyors of falsehoods.”<sup>8</sup> This perception is due in large part to the fact that witness preparation routinely takes place in private. Therefore, many of the ethical issues that might arise within the context of witness preparation are seldom litigated. The fine line between proper witness “preparation” and improper witness manipulation and intimidation—sometimes called witness “coaching”—is rarely disciplined or even detected.<sup>9</sup> The majority of cases dealing with witness preparation address overt attempts to suborn perjury<sup>10</sup> or the failure of the prosecutor to turn over inconsistent prior statements of the witness.<sup>11</sup> The difficult issues arise in the non-overt actions by the criminal attorney, when the attorney does not believe that what he is doing is suborning perjury

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7. See Gershman, *Witness Coaching by Prosecutors*, *supra* note 1, at 851–53 (2002) (a good discussion of methods that can be used to detect improper witness coaching). See also *In re Cendant Corp. Securities Litig.*, 343 F.3d 658 (3d Cir. 2003) (finding that witness preparation was privileged under the work product doctrine); Richard C. Wydick, *The Ethics of Witness Coaching*, 17 *CARDOZO L REV.* 1, 23 (1995) (discusses many reasons why witness preparation is difficult to expose); LeGrande & Mierau *supra* note 6, at 947 (improper witness coaching is difficult to detect).

8. Luban, *supra* note 5, at 96. See Applegate, *supra* note 1, at 279.

9. See Michael Higgins, *Fine Line*, 84 *A.B.A. J.* 52, 52–53 (May 1998) (quoting Stephen Gillers’ observation that “charges of unethical witness coaching and suborning of perjury are extraordinarily difficult to prove”); Gershman, *Witness Coaching by Prosecutors*, *supra* note 1, at 829–830 (witness preparation is usually conducted in private and cross-examination may not expose the improper behavior).

10. See Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of “Coaching,”* 1 *GEO. J. LEGAL ETHICS* 389, 393 (1987); *Salmi*, *supra* note 1, at 137 (it is obvious to most attorneys to avoid suborning perjury when preparing a witness).

11. See *Kyles v. Whitley*, 514 U.S. 419 (1995); *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992); Gershman, *Witness Coaching by Prosecutors*, *supra* note 1, at 834–837. For a full discussion of these two cases see *State v. Campbell*, 23 P.3d 176 (Kan. App. 2001) (misconduct to fail to disclose a prior inconsistent statement to the defense).

but rather merely improving truthful testimony. There is a considerable ambiguity in the boundary between permissible witness “preparation” and impermissible witness “coaching.”<sup>12</sup>

In *Geders v. United States*,<sup>13</sup> the Supreme Court acknowledged that a lawyer is ethically prohibited from improperly influencing witness testimony, but failed to define what constitutes improper influence.<sup>14</sup> The Supreme Court recognized that the rules providing for witness sequestration were adopted, in part, to prevent “improper attempts to influence the testimony in light of the testimony already given.”<sup>15</sup> However, the Court found that improper witness coaching should be defined by the disciplinary rules that govern false evidence.<sup>16</sup>

## II. ABA Model Rules of Professional Conduct Regulate False Testimony

Even though the Supreme Court in *Geders* referred to the disciplinary rules, the ABA Model Rules of Professional Conduct (hereafter referred to as the ABA Rules) do not specifically address witness preparation.<sup>17</sup> ABA Rule 1.1 defines competent representation to include “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>18</sup> However,

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12. See Michael Higgins, *Fine Line*, A.B.A. J., at 52–53 (noting that “the line where legitimate witness preparation crosses into unethical coaching is fuzzy”). See also Gershman, *Witness Coaching by Prosecutors*, *supra* note 1, at 831; Michael S. Ross, *Ethical Issues in Removal Proceedings*, 190 PLI/NY 121, 139 (2009) (quoting *Knox v. Hayes*, 933 F. Supp. 1573, 1582 (S.D.Ga.1995) (“the line between advocacy and falsehood is blurry”).

13. *Geders v. United States*, 425 U.S. 80 (1976).

14. *Id.* at 80; Piorkowski *supra* note 10, at 87 (a lawyer’s duty as an officer of the court prevents them from improperly influencing testimony but states that what is unacceptable influencing testimony is not clearly defined).

15. *Id.* at 87.

16. See *id.* at 90 n.3. See *Perry v. Leeke*, 488 U.S. 272, 281–282 (1989) (stating sequestration prevents the witnesses’ testimony from being influenced by other witnesses’ testimony).

17. Peter J. Henning, *The Pitfalls of Dealing with Witnesses in Public Corruption Prosecutions*, 23 GEO. J. LEGAL ETHICS 351, 368 (2010) (“The professional responsibility rules put the onus on the individual lawyer to decide what to do, and there is no set of guidelines that can be provided for judging how far witness preparation can go or to say when testimony crosses the line into falsity and perhaps even perjury. It is ultimately the lawyer’s personal sense of propriety—the individual’s moral compass—that will determine what is appropriate.”). LeGrande & Mierau *supra* note 6, at 947 (2004) (“the United States judiciary and the ABA have . . . avoided the topic of witness preparation.”).

18. A.B.A. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2002) [hereinafter “MODEL RULES”].

the rule does not define the proper preparation of witnesses. It merely requires “inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners.”<sup>19</sup> A question then arises among practitioners: What is proper witness preparation and what is improper witness coaching?<sup>20</sup>

The ABA Rules prohibit certain witness testimony that could in fact be the product of improper coaching. The ABA Rules strictly prohibit the lawyer from knowingly offering false or perjurious testimony.<sup>21</sup> Additionally, the ABA Rules require that if a lawyer subsequently discovers that information offered to a tribunal is false, he must correct the false information.<sup>22</sup> Further, the ABA Rules prohibit conduct that involves “dishonesty, fraud, deceit or misrepresentation.”<sup>23</sup>

ABA Rule 3.3 requires that the attorney “know” that he is offering false testimony. The term is defined as “actual knowledge of the fact in question.”<sup>24</sup> However the Supreme Court and the ABA Rules are not helpful in determining how much information is sufficient to satisfy this knowledge requirement.<sup>25</sup> The definition of “knowledge” has been debated predominately in the area of defendant’s intended perjury. The definition of “knowingly” has run the gambit from a requirement that the attorney knows beyond a reasonable doubt,<sup>26</sup> to a requirement that the attorney have a firm

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19. MODEL RULES, *supra* note 18, at R. 1.1 cmt. (2002).

20. Robert S. Thompson, *Decision, Disciplined Inferences and the Adversary Process*, 13 CARDOZO L. REV. 725, 770 (1991) (finding the line between witness preparation and witness coaching both “fuzzy and shifting”); Piorkowski, *supra* note 10, at 390 (discusses three gray areas of witness preparation); Carter *supra* note 2, at 469 (the line between witness preparation and witness coaching is not a “bright line” rule).

21. MODEL RULES, *supra* note 18, at R. 3.3(a)(2) and R. 3.4 (2002).

22. *Id.* at R. 3.3.

23. *Id.* at R. 8.4(c).

24. *Id.* at R. 1.0(f).

25. Gerald L. Shargel, *Federal Evidence Rule 608(B): Gateway to the Minefield of Witness Preparation*, 76 FORDHAM L. REV. 1263, 1285 (2007).

26. *Shockley v. State*, 565 A.2d 1373, 1379 (Del. 1989); Shargel, *supra* note 25, at 1287; Brian Slipakoff & Roshini Thayaparan, *The Criminal Defense Attorney Facing Prospective Client Perjury*, 15 GEO. J. LEGAL ETHICS 935, 942–43 (2002) (discussing the knowledge requirement, and the gray area that lies between the two extreme interpretations); Erin K. Jaskot & Christopher J. Mulligan, *Witness Testimony and the Knowledge Requirement: An Atypical Approach to Defining Knowledge and Its Effect on the Lawyer as an Officer of the Court*, 17 GEO. J. LEGAL ETHICS 845, 846 (2004) (invocation of MODEL RULES, *supra* note 18, at R. 3.3 depends on the jurisdiction’s definition of knowingly).

factual basis,<sup>27</sup> to a mere requirement that the attorney has a good faith basis to believe.<sup>28</sup> Professor Freedman argues that because litigants in trial inevitably recreate the relevant events, the advocate's duty is to construct a theory of what occurred which is in the client's best interests.<sup>29</sup> "The ethical distinction lies in whether the lawyer assists the witness in developing the facts, or in creating them; the former being permitted, the latter prohibited."<sup>30</sup> Therefore, lawyers who unintentionally or unknowingly encourage false testimony may not be directly regulated by the ethical rules. Professor Shargel suggests that since the definitions of "knowingly" are so varied and ill-defined, this standard encourages attorneys to remain ignorant.<sup>31</sup>

As to Rule 8.4 (c) it is unclear what mental state is required.<sup>32</sup> The rule itself does not use the word "knowingly" in defining the violation. The courts that have addressed this rule have not been consistent in their analysis.<sup>33</sup> Courts have required knowledge,<sup>34</sup>

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27. *United States v. Long*, 857 F.2d 436, 444 (8th Cir. 1988); *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977); Shargel *supra* note 26, at 1287; *Riley v. Carroll*, 2007 WL 1795883 (D. Del. June 19, 2007) (referencing reasonable doubt standard from *Shockley*, 565 A.2d 1373); *Pennsylvania v. Alderman*, 437 A.2d 36, 36 (Pa. Super. Ct. 1980); *Butler v. United States*, 414 A.2d 844 (D.C. 1979); *Jaskot & Mulligan*, *supra* note 26, at 858 (stating the different knowledge standards that courts apply).

28. *Illinois v. Bartee*, 566 N.E.2d 855, 857 (Ill. App. Ct. 1991); Shargel, *supra* note 25, at 1286; *Commonwealth v. Mitchell*, 781 N.E.2d 1237, 1247–48 (Mass. 2003) (stating differing standards, the court applies the firm factual basis standard). *See also* *Whileside v. Scurr*, 744 F.2d 1328 (8th Cir. 1984) (applying the firm factual basis standard for knowledge); *Sanborn v. State*, 474 So. 2d 309 (Fla. App. 1985); *Brown v. Commonwealth*, 226 S.W.3d 74, 81 (Ky. 2007) (affirming the firm factual basis standard); *Jaskot & Mulligan*, *supra* note 26, at 858 (stating the different knowledge standards that courts apply).

29. *See* MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM*, 59–77 (1975); *People v. Flores*, 538 N.E.2d 481 (Ill. 1989); *People v. Taggart*, 599 N.E.2d 501 (Ill. App. 1992); *Slipako & Thayaparan*, *supra* note 26, at 944 (stating the different standards that courts use to interpret knowledge); *Jaskot & Mulligan*, *supra* note 26, at 858 (states the different knowledge standards that courts apply).

30. *See* Applegate, *supra* note 1, at 303; Shargel, *supra* note 25, at 1264 (suggesting that Freedman argues the duty to maintain client confidences trumps the duty of candor).

31. Shargel, *supra* note 25, at 1288.

32. Douglas Richmond, *Lawyers' Professional Responsibilities and Liabilities in Negotiations*, 22 GEO. J. LEGAL ETHICS 249, 270 (2009); Philip L. Pomerance & Lisa D. Taylor, *Lawyers as Snitch or Saint: Do Client Confidences Stay Confidential?*, AHLA PAPER P07030210 (stating that there is no duty to investigate presumptively truthful assertions a client makes).

33. Richmond, *supra* note 32. *See* Joseph Z. Fleming, *E-Ethics*, ALI-ABA Course of Study, SR035 ALI-ABA 1479 (2010) (if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer's state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous; also a different standard may

reckless disregard,<sup>35</sup> and even gross<sup>36</sup> or simple negligence.<sup>37</sup> Regardless of the standard applied, it is clear that the attorney's motivation is irrelevant.<sup>38</sup> Under the language of ABA Rule 8.4 (c), the standard can be applied very expansively; it can apply to a lawyer's activities that do not include the attorney even making a statement.<sup>39</sup> The ABA Rule can apply to dealings inside and outside the courtroom and with any person.<sup>40</sup> However, the extensive interruptions of this rule give it little practical guidance to the practitioner.

Finally, the ABA Rules prohibit "conduct that is prejudicial to the administration of justice."<sup>41</sup> This term is not defined in the ABA Rules, and some have criticized the rule as vague and uncertain.<sup>42</sup>

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apply to persons serving as mediators); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 272 (stating the terms used in rule 84(c) are not defined in the rule).

34. Richmond, *supra* note 32 (citing Fla. Bar v. Mogil, 763 So. 2d 303, 309–11 (Fla. 2000)); *In re Firstenberger*, 878 N.E.2d 912, 913–914 (Mass. 2007); *In re Skagen*, 149 P.3d 1171, 1184 (Or. 2006); Sean Keveney, *The Dishonesty Rule: A Proposal for Reform*, 81 TEX. L. REV. 381, 382 (2002) (the language of rule 8.4 is broad and courts have not adopted a consistent interpretation).

35. Richmond, *supra* note 32 (citing *In re Ukwu*, 926 A.2d 1106, 113–14 (D.C. 2007)); Iowa Supreme Court Attorney Discipline Bd. v. Gottschalk, 729 N.W. 812, 818 (Iowa 2007); Office of Disciplinary Counsel v. Surrick, 749 A. 441, 445 (Pa. 2000).

36. Richmond, *supra* note 32 (citing Walker v. Supreme Court Comm'n On Prof'l Conduct, 246 S.W.3d 418, 424 (Ark. 2007)); *In re Skagen*, 149 P.3d 1171 (Or. 2006); Fla. Bar v. Riggs, 944 So. 2d 167 (Fla. 2006); *In re Surrick*, 338 F.3d 224 (3d Cir. 2003); Attorney Grievance Comm'n of Md. v. Jaseb, 773 A.2d 516, 522–23 (Md. 2001) (applying the standard that false statements must be made intentionally; however, the court recognizes that other jurisdictions use standards of reckless disregard).

37. Richmond, *supra* note 32 (citing *In re Doughty*, 832 A.2d 724, 734–35 (Del. 2003)) (Professor Richmond notes that this is a minority position).

38. Richmond, *supra* note 32. See also *In Re Pautler*, 47 P.3d 1175 (Colo. 2002).

39. ANN. A.B.A. MODEL RULES PROF'L CONDUCT R. 8.4 (2007); *In re Schneider*, 553 A.2d 206, 209 (D.C. App.) (found deceit could violate the rule regardless of the intent or motive); Richmond, *supra* note 32, (stating that the attorney's motivation is irrelevant when evaluating conduct).

40. Richmond, *supra* note 32.

41. MODEL RULES, *supra* note 18, at R. 8.4.

42. *In re Haws* 801 P.2d 818, 822 (Or. 1990); Nancy Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1 (2010); Donald T. Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267, 275–76 (1970); John F. Sutton, *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 502 n. 13 (1979); Martha E. Johnson, Comment, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C. L. REV. 671, 689 (1979). But see the following cases where the courts have upheld the constitutionality of the rule. *In re Rook*, 556 P.2d 1351 (1976); *State ex rel. Okla. Bar Ass'n v. Bourne*, 880 P.2d 360 (Okla. 1994); *Howell v. State Bar Tex.*, 843 F.2d 205, 208 (5th Cir. 1988) (finding that the



The rule has been used to address conduct that does not violate another professional conduct rule but results in substantial injury to the justice system.<sup>43</sup> This rule sanctions conduct that resembles obstruction of justice, including: advising a witness to testify falsely; improperly paying a witness; refusing to respond to disciplinary investigations, or repeatedly disrupting a proceeding.<sup>44</sup> The language is straightforward but the difficulty is in determining the breadth of the rule.<sup>45</sup> The Oregon Supreme Court's examination of each of the five key words in the rule is instructive.<sup>46</sup> The Court defined "conduct" to include both acting improperly and failing to act when required.<sup>47</sup> The Oregon Court's rule also included any proceedings "that contains the trappings of judicial proceeding, such as sworn testimony, perjury sanctions, and subpoenas."<sup>48</sup> "Administration" includes both effect of the lawyer's conduct on the proceedings and

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disciplinary rule was not unconstitutionally vague because lawyers have the benefit of guidance provided by "case law, court rules and the 'lore of the profession'").

43. Robert E. Juceam, *Hypotheticals, Selected References on Ethics, and Selected Excerpts from the New York Rules of Professional Conduct*, 1768 PLI/CORP 505 (2009). See Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 335 (1997) (stating ABA rules are sometimes unsure of interpretation); Noah D. Stein, *Prosecutorial Ethics and the McNulty Memo: Should the Government Scrutinize an Organization's Payment of its Employees' Attorneys' Fees?*, 75 FORDHAM L. REV. 3245, 3263 (2007) (recognizing that many authors have opined that the rule is too vague, especially for prosecutors); Johnson, *supra* note 42, at 684–85 (1979) (criticizing the rule against engaging in conduct prejudicial to the administration of justice on the grounds that it is too broad and too vague); Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 117 (1996) (pointing out that the model rules, generally, do not provide much guidance).

44. *People v. Chambers*, 154 P.3d 419, 429 (Colo. 2006); *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003) (describing the conduct the rule prohibits as seriously interfering with the justice system); Juceam, *supra* note 43; Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CIN. L. REV. 577, 582–83 (2005).

45. *Dodd v. Fla. Bar*, 118 So. 2d 17 (Fla. 1998); *In re Haws* 801 P.2d 818, 822 (Or. 1990).

46. *Id.*; Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 193–94 (1999) (mere potential harm to the justice system is sufficient).

47. *Haws*, 801 P.2d at 822.

48. *Id.* at 823; Richmond *supra* note 46 at 193–194 (conduct refers to errors of commission and omission); *In re Stauffer*, 956 P.2d 967, 976 (Or. 1998) (discussing identical language in DR 1–102(A), the court stated that the term "conduct" refers "to doing something that a lawyer should not do, or failing to do something that a lawyer should do"). *Spradlin v. Ark. Ethics Comm'n*, 858 S.W.2d 684, 692 (Ark. 1993) (citing *Haws*, 801 P.2d 818).

the substantive rights of any of the parties.<sup>49</sup> The Court made it clear that it is the potential prejudice on the proceedings that must be assessed.<sup>50</sup> “Prejudice” includes repeated conduct that causes some harm or a single act causing substantial harm to the administration of justice.<sup>51</sup> Therefore, an attorney might be disciplined for improper witness coaching under this rule if it can be shown that the methods used by the criminal attorney have a potential to harm the proceeding. It would be helpful, therefore, to define for the criminal attorney some of the methods that might fall under this rule.

Professor Silver noted “everyone knows that it is wrong to ask a witness to lie. What is not known is how far a lawyer can properly push a witness short of that.”<sup>52</sup> Since the ABA Rules do not speak directly to the permitted or prohibited conduct of the lawyer when preparing a witness, “there remains a vast realm of conduct that could potentially be characterized as improperly seeking to influence a witness’ testimony. Within this area, there are very few guideposts to assist the attorney in maximizing his effectiveness as an advocate while still remaining within the recognized limits of professional responsibility.”<sup>53</sup> Some will argue that “attorneys now have essentially unlimited license to do almost anything in the process of preparing witnesses short of buying witnesses or suborning perjury.”<sup>54</sup>

Some courts have attempted to define proper witness preparation to require more than merely refraining from encouraging or aiding in perjurious testimony. For example, the court in *State v. McCormick* defined proper witness preparation as “preparing the

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49. *Haws*, 801 P.2d at 822. See also *In re Conduct of Gustafson*, 968 P.2d 367, 372 (Or. 1998) (using the three part test from *Haws*, and describing judicial proceedings); *Richmond supra* note 46 at 193–94 (administration of justice refers “to procedural functioning of a judicial matter or the substantive interests of a party”); *In re Wyllie*, 952 P.2d 550, 553 (Or. 1998) (discussing identical language in Model Code DR 1-102(A)).

50. *Haws*, 801 P.2d at 823 (citing *In re Boothe*, 740 P.2d 785 (Or. 1998) (holding an attorney’s unsuccessful attempt to induce a witness not to testify is prejudicial)). See also *In re Conduct of Gustafson*, 968 P.2d 367, 372 (“Prejudice may arise from several acts that cause some harm to the administration of justice or from a single act that causes substantial harm to the administration of justice.”) (citing *Haws*, 81 P.2d at 818); *In re Smith*, 848 P.2d 612, 614 (1993).

51. *Haws*, 801 P.2d at 823.

52. Charles Silver, *Preliminary Thoughts on the Economics of Witness Preparation*, 30 TEX. TECH. L. REV. 1383, 1383 (1999). See also *Richmond, supra* note 46 at 193–94 (prejudice refers to even potential harm of the conduct). See *In re Morris*, 953 P.2d 387, 392 (Or. 1998) (discussing identical language in Model Code DR 1-102(A)).

53. See *Piorkowski, Jr., supra* note 10, at 389.

54. *Gross, supra* note 4, at 1137. See also *Carter, supra* note 2, at 468–469 (lists objectives for witness preparation from *Piorkowski, Jr.*).

witness to give the witness' [sic] testimony at trial and not the testimony that the attorney has placed in the witness' [sic] mouth."<sup>55</sup> In addition, the Eleventh Circuit in *Crutchfield v. Wainwright* defined improper witness coaching as attempts to direct "a witness's testimony in such a way as to have it conform with, conflict with, or supplement the testimony of other witnesses."<sup>56</sup> The New York Court of Appeals opined that the lawyer's "duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."<sup>57</sup> However, the simple axiom—that proper witness preparation helps the witness understand "how" to testify, not "what" to testify about—is much easier said than practiced.

### III. Witness Preparation Guidelines in the Criminal Justice Standards

Given that the ABA Rules do not specifically guide the practitioner in appropriate witness preparation outside of the area of knowingly suborning perjury, the Criminal Justice Standards might be helpful in guiding the practitioner. The Criminal Justice Standards<sup>58</sup> were first adopted in 1968. Chief Justice Warren Burger described the Standards project as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history."<sup>59</sup> The ABA Criminal Justice Standards "are intended to be used as a guide to professional conduct and performance."<sup>60</sup> Recently, the Criminal Justice Standards have been undergoing a revision.

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55. *State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979).

56. *Crutchfield v. Wainwright*, 803 F.2d 1103, 1110 (11th Cir. 1986).

57. *In re Eldridge*, 82 N.Y. 161, 171 (1880).

58. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION & DEFENSE FUNCTION (3d ed. 1993).

59. Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251 (1974).

60. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.1 (Proposed Revisions 2010) [hereinafter "PROPOSED PROSECUTION STANDARDS"]; STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-1.1 (Proposed Revisions 2010) [hereinafter "PROPOSED DEFENSE STANDARDS"]; Rory K. Little, *The Role of Reporter for a Law Project*, 38 Hastings Const. L.Q. 747 (Appendix: ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Defense Function) (2011) [hereinafter Little, App.: Proposed Defense Standards].

The ABA Standards of Criminal Justice contain three proposed Standards that relate to witness preparation by prosecutors: Standard 3-4.2, "Relationship With Victims and Prospective Witnesses;" Standard 3-4.3, "Relationship with Expert Witnesses;" and Standard 3-7.6, "Presentation of Evidence." There are four applicable Proposed Defense Standards: Standard 4-3.3, "Interviewing Clients;" Standard 4-4.4, "Relationship with Witnesses;" Standard 4-4.5, "Relationship with Expert Witnesses;" and Standard 4-7.5, "Presentation of Evidence."<sup>61</sup>

Proposed Standard 3-4.2 contains ten prohibitions.<sup>62</sup> The Proposed Standard prohibits the prosecutor from paying a witness or providing benefits to a witness that are not authorized by law or might affect the witness's testimony. It prohibits interviewing alone a criminally implicated witness. Additionally, Proposed Standard 3-4.2 requires a prosecutor to advise a witness about the witness's rights against self-incrimination in order to inform, not to intimidate. The Proposed Standard requires the prosecutor to respect the rights of victims and witnesses, consult with them before making significant decisions in the case, and provide appropriate information and protection when necessary. Prosecutors should give witnesses notice of when their presence is required. Finally, this Proposed Standard prohibits an inappropriate relationship between the prosecutor and victims or witnesses. All of the prohibitions deal with how the prosecutor should interact with witnesses, but do not deal with what the prosecutor should discuss with the witness.

Proposed Standard 3-4.3 deals with the relationship of the prosecutor with the expert witness.<sup>63</sup> The Proposed Standard suggests that before a prosecutor engages or offers an expert witness, the prosecutor should evaluate the credentials, experience, and reputation of the expert and investigate the scientific acceptance of the expert's testing procedures and methods. The Proposed Standard also requires the prosecutor to refrain from paying the expert excessive fees that might influence the expert's testimony. The Proposed Standard recommends that the prosecutor provide all information to the witness that is necessary for a thorough and fair opinion and warns the witness that his opinions and any documents

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61. See Little, App.: Proposed Defense Standards, *supra* note 60.

62. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-4.2; Little, App.: Proposed Defense Standards, *supra* note 60.

63. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-4.3; Little, App.: Proposed Defense Standards, *supra* note 60.

provided to him may be discoverable.<sup>64</sup> Finally, unlike the Standard for lay witnesses, the Proposed Standard for expert witnesses discusses what the prosecutor should discuss with the expert. The Proposed Standard encourages the prosecutor to clarify that the role of the expert in the courtroom is to be an impartial witness to assist the fact finder, explain how the examination will be conducted, and suggest likely impeachment questions that might be asked by opposing counsel.

For the defense attorney, the Proposed Standards are equally vague when looking for guidance on witness preparation. Proposed Standard 4-3.3 deals with the criminal defense attorney interviewing his client. The Proposed Standard encourages the attorney to share with the criminal defendant all the available evidence and encourages the client to be candid about all the facts that he knows. Additionally, the Proposed Standard requires that the attorney discuss with the client the "possible options and strategies . . . without seeking to materially limit the substance of the client's factual responses."<sup>65</sup> This last Standard infers limits on the criminal defense attorney's methods in witness preparation.

Proposed Standard 4-4.4 deals with the relationship of the criminal defense attorney to the prospective witnesses.<sup>66</sup> After dealing with the prohibitions against compensating witnesses, the Standard makes it clear that the defense attorney does not need to advise witnesses as to their constitutional rights against self-incrimination.<sup>67</sup> Additionally, the Standard cautions against advising witnesses not to speak to the prosecutor.<sup>68</sup> No attempt is made in the Standard to define what information or directions the defense attorney should give the witness in preparation for trial.

Finally, Proposed Standard 4-4.5<sup>69</sup> is almost identical to Proposed Standard 3-4.3. As described above, this is the only Standard that

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64. PROPOSED PROSECUTION STANDARDS, *supra* note 60, § 3-4.3; Little, App.: Proposed Defense Standards, *supra* note 60.

65. PROPOSED DEFENSE STANDARDS, *supra* note 60, § 4-3.3(d); Little, App.: Proposed Defense Standards, *supra* note 60.

66. PROPOSED DEFENSE STANDARDS, *supra* note 60, § 4-4.4; Little, App.: Proposed Defense Standards, *supra* note 60.

67. PROPOSED DEFENSE STANDARDS, *supra* note 60, § 4-4.4(b) & (c); Little, App.: Proposed Defense Standards, *supra* note 60.

68. PROPOSED DEFENSE STANDARDS, *supra* note 60, § 4-4.4(f); Little, App.: Proposed Defense Standards, *supra* note 60.

69. PROPOSED DEFENSE STANDARDS, *supra* note 60, § 4-4.5; Little, App.: Proposed Defense Standards, *supra* note 60.

mentions what a criminal attorney should tell a witness about their testimony. Additionally, Proposed Standard 4-7.5,<sup>70</sup> dealing with the presentation of evidence, is much like Proposed Standard 3-7.6 and does not discuss the preparation of witnesses.

#### **IV. Should These Witness Preparation Methods Be Regulated?**

##### **A. Interviewing Witnesses Together**

A method used routinely by many prosecutors to prepare witnesses, especially law enforcement witnesses, is to meet with all of the witnesses at one time. Group preparation brings together all of the witnesses to the relevant event. This method of witness preparation saves time and allows all the witnesses to get a complete picture of the events. Additionally, this method is the surest way to avoid contradictions among the witnesses by assuring that each knows what the other witnesses remember.

The possible ethical pitfalls in this method are obvious. The lawyer may be telling the witnesses either directly or indirectly that their testimony needs to be consistent. Thus, witnesses who may remember the events differently may be convinced to change their testimony to fit the other witnesses' perceptions. The lawyer will likely not tell the witnesses to change their stories but will attempt to "understand" the inconsistencies and in his or her conversation may in fact be encouraging false testimony. Of course, the written reports of the witnesses will allow the opposing counsel to cross-examine the witnesses on any inconsistencies, but many times the details that are "lined up" may not have even been in the report.<sup>71</sup> Even when the lawyer emphasizes that the witnesses must rely on their own memories of the events, the pressure to conform testimony to the other witnesses' stories and eliminate contradictions is sometimes overwhelming.<sup>72</sup> Unlike the use of statements to refresh recollection, preparing witnesses together is more likely to cause witnesses to be

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70. PROPOSED DEFENSE STANDARDS, *supra* note 60, § 4-7.5; Little, App.: Proposed Defense Standards, *supra* note 60.

71. See, e.g., *United States v. Ebens*, 800 F.2d 1422, 1431 n.2 (6th Cir. 1986) (attorney brought the witnesses together to "help each other remember exactly what happened, how it happened, when it happened, and all the *minor details*." (emphasis added)).

72. Applegate, *supra* note 1, at 309 (stating that the problem occurs when a witnesses actual memory is changed during witness preparation "by the witness or, possibly, by the lawyer," many times the testimony will not be discredited "because the witness sincerely believes the testimony is true.").

influenced by other witnesses.<sup>73</sup> After all, Professor Hodes asks, “how do we know when the result of a session in the horse shed [with a witness] is refreshing recollection, and when it is prompting perjury?”<sup>74</sup>

The ABA Model Rules or Standards do not address this method of preparing witnesses. The courts that have addressed group preparation have merely discussed the use of information about the meeting to cross-exam the witnesses and not the propriety of the method. For example, in *United States v. Ebens* the Sixth Circuit discussed a meeting between several witnesses.<sup>75</sup> The defendants in *Ebens* were charged with civil rights violations. The group meeting was conducted by a civil rights activist who was not connected to the prosecution, and it occurred after the state had prosecuted them but before the federal case was tried. The session was recorded and one of the witnesses was persuaded that he had heard racial slurs, although he had denied it previously.<sup>76</sup> The Sixth Circuit held that the trial court erred in not allowing the defendants to introduce the recording of the meeting in the trial.<sup>77</sup>

## **B. Encouraging Changes in the Defendant's or Witness's Appearance**

Routinely, in witness preparation the criminal attorney will discuss with the witness how the witness should dress and act in court. Most witness preparation manuals would suggest that this discussion should be a central part of witness preparation. It is important that the client or witnesses do not appear in court in a way that will negatively affect the juror's consideration of the facts. This includes wearing clothes that are respectful to the proceedings and appearing clean and well-groomed. The trick is to encourage witnesses to look like they respect the court without looking like they have been forced

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73. Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 DUQ. L. REV. 715, 780 (1998) (stating group preparation can result in a waiver of privilege and work product); John G. Koeltl & Paul C. Palmer, *Preparing a Witness to Testify*, in 469 LITIGATION & ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES, LITIGATION 9, 22 (Practicing Law Institute, 1993) (acknowledging that privilege claims may be more difficult to sustain in the event of group preparation of witnesses).

74. W. William Hodes, *The Professional Duty to Horseshed Witness—Zealously, Within the Bounds of the Law*, 30 TEX. TECH. L. REV. 1343, 1349 (1999).

75. *Ebens*, 800 F.2d at 1430–31.

76. *Id.* at 1431.

77. *Id.* See also *United States v. Townsley*, 843 F.2d 1070, 1086 (8th Cir. 1988) (group preparation of witnesses in which the attorney suborned perjury did not constitute privileged communication).

to dress in a manner that is inconsistent with who they are. Jurors will be suspicious of a client or witness who looks like he just put on someone else's clothes in order to fool the jury. It is therefore expected that the defendant, victim, and witnesses will be "cleaned up" for court.

However, can the "cleaning up" of a witness, victim, or defendant go too far and actually violate the rules of professional conduct? For example, in an identification case can the attorney suggest to the defendant that he alter his appearance so that the victim is unable to recognize him in court?<sup>78</sup> Of course, there are other ways to identify the defendant rather than in-court witness' identification; however, the identification by the victim is usually a dramatic and an expected part of the prosecution's case. The questions become how far can the criminal attorney go in changing the appearance of the defendant or victim and should the standards address that issue.

### **C. Telling the Witness About the Factual and Legal Issues in the Case**

In witness preparation, what and how much information should be given to the witness is an important consideration. General information about the proceedings is expected; however, how much case specific information—factual and legal—should the witness be told is subject to some debate. Some suggest that telling the witness about the law that surrounds the case and the other witnesses' testimony will help the witness understand what part their testimony plays in the case as a whole. Specific information about the case can also help the witness understand what facts are important and relevant. For example, the lawyer may explain his theory of the case and how the witness's testimony fits into the theory. He might discuss the elements of the claim or charge and the facts that tend to prove these elements. Additionally, the witness and the lawyer may discuss other testimony in order to prepare explanations for any inconsistencies or in order to refresh the witness's own memory.<sup>79</sup> However, as one scholar noted:

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78. For example, by shaving off his hair or dyeing it another color.

79. Stan Perry & Teshia N. Judkins, *Ethical Witness Preparation: Stepping Back from the Line for the Lecture*, 48 HOUS. LAW. 34 (2010) (a prohibition against informing a client on the law is not practical; ethical rules require lawyers to inform clients of legal rights and obligations and in preparing witnesses they should be informed so they may understand what is relevant); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 500 (1990) (stating some lawyers believe you must inform a client in order to best represent them); Wydick, *supra* note 7, at 26; Applegate, *supra* note 1, at 300-01



[A]rming the client with pertinent legal information and trusting the client to make good and legitimate use of it demonstrates loyalty and zealousness. Recognizing that at some point a loyal servant can be manipulated into becoming an accomplice in crime is honoring the bounds of law. And knowing how to flirt with that boundary line but not cross over it is true professionalism.<sup>80</sup>

This is an important line that must be drawn when considering what information should be imparted to the defendant, victim or witness.

Clearly the disclosure of case-specific information has the potential to influence the witness to testify falsely. Explaining to the witness or defendant the law, theory, or other evidence can encourage them to change their testimony to fit the advocate's theory of the case. Most lawyers are familiar with the infamous scene from the movie "Anatomy of a Murder," in which a criminal defense lawyer is defending a man charged with murdering his wife's rapist. The attorney explains the legal importance of the time between the rape and the murder. Subsequently the defendant adapts his story to buttress the defense.<sup>81</sup>

Additionally, supplying information regarding other evidence and testimony can affect the witness's assessment of his recollection; the witness may in fact begin to intentionally or unintentionally to incorporate other witnesses' testimony into his own. Further, the sharing of other witnesses' testimony could cause a witness to become more positive in his testimony than his own memory or observations would justify. Professor Shargel raises an interesting question in witness preparation when he discusses whether an attorney should tell his client about the limitations on proof contained in Federal Rule 608.<sup>82</sup> He states that this information could cause a client to deny the existence of a "prior bad act of untruthfulness," knowing that the opposing counsel will be unable to prove it under the collateral evidence rule. Professor Shargel believes that informing the client

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(discussing the law with your client is important but it may have less attractive points as well, such as shaping testimony).

80. Hodes, *supra* note 74, at 1349.

81. Albert W. Alshuler, *Courtroom Misconduct by Prosecutors & Trial Judges*, 50 TEX. L. REV. 629, 638 (1972); Perry & Judkins, *supra* note 79 (describes "Anatomy of a Murder"). See also J. Alexander Tanford, *The Ethics of Evidence*, 25 AM. J. TRIAL ADVOC. 487, 533 (2002) (provides the dialogue between the lawyer and client from "Anatomy of a Murder").

82. Shargel, *supra* note 24, at 1267.

assists him in protecting himself against cross-examination. Since the ABA Rules only prohibit an attorney from knowingly assisting a client to commit perjury, some argue that zealous representation requires this information to be given to the client.<sup>83</sup> The Criminal Justice Proposed Standard 4-3.3 hints that a criminal attorney should be careful not to “materially limit the substance of the client’s factual responses” by discussing the alternatives and strategies of the case.<sup>84</sup>

#### D. Preparing Witnesses after a Sequestration Order

The court, pursuant to section 615 of the Federal Rule of Evidence,<sup>85</sup> can order that all witnesses, except those specifically delineated in the rule, are excluded from the court and prohibited from discussing their testimony with other witnesses. The purpose of this rule is to prevent witnesses from tailoring their testimony to be consistent with other witnesses that have already testified.<sup>86</sup> Witness sequestration is commonly used because it “effectively discourages and exposes fabrication, inaccuracy, and collusion.”<sup>87</sup> However, the standard sequestration order does not preclude the attorney from discussing previous testimony with witnesses that have not yet testified.<sup>88</sup>

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83. *Id.*

84. *See supra* text accompanying note 65.

85. Fed. R. Evid. 615 states:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party’s cause, or (4) a person authorized by statute to be present.

86. *See, e.g.,* Carter, *supra* note 2, at 465–67.

87. *Id.* at 465 (citing *United States v. Famham*, 791 F.2d 331, 335 (4th Cir. 1986); *United States v. Rhynes*, 218 F.3d 310, 317 (4th Cir. 2000)). *See also* Matthew M. Valcourt, *Rule 615—Beyond the Walls of the Courtroom Proper: Efficacious Truth-Seeking Device or Toothless Tiger?*, 10 SUFFOLK J. TRIAL & APP. ADVOC. 115, 116 (2005) (the goal of witness sequestration is to prevent witnesses from tailoring their testimony to prior witnesses and to aid the fact finder in determining the truth); Kurtis A. Kemper, *Exclusion of Witnesses Under Rule 615 of Federal Rules of Evidence*, 181 A.L.R. FED. 549, 549 (2002) (Rule 615 is intended to “discourage and expose fabrication, inaccuracy, and collusion and to minimize the opportunity that each witness will have to tailor testimony to the testimony of other witnesses.”).

88. *Rhynes*, 218 F.3d at 317; *United States v. Buchanan*, 787 F.2d 477, 485 (10th Cir. 1986). *See also* Carter, *supra* note 2, at 465; Sarah Chapman Carter, *Exclusion of Justice: The Need for a Consistent Application of Witness Sequestration Under Federal Rule of Evidence 615*, 30 U. DAYTON L. REV. 63, 67–68 (2004); *United States v. Sepulveda*, 15 F.3d 1161, 1176 (1st Cir. 1993) (a bare sequestration order does not extend to beyond the

Although attorneys are permitted to speak to witnesses after the court has sequestered the witnesses, a criminal attorney must consider the effect of sharing that information. This method of witness preparation can be even more persuasive to the witness in encouraging the witness to change the witness's testimony to fit the other witnesses' testimony. There are no guidelines as to how far an attorney can go in preparing witnesses after the trial has begun. The question remains whether there should be even more restrictions at this stage of the proceedings in light of the opportunity for abuse.

**E. Do Prosecutors and Defense Attorneys Have Different Roles in Witness Preparation?**

In discussing ethical responsibilities in the criminal context, the question always arises whether the ethical duties of the prosecutor should mirror that of the criminal defense attorney. In dealing directly with the criminal defendant, there arise issues of witness preparation that do not arise for the prosecutor. Clearly, the criminal defendant is entitled to more information about the case and the legal options than is an ordinary witness or victim. Additionally, the defendant is entitled to testify in his defense—regardless of the attorney's opinion. Finally, the constitutional issues regarding the defendant's Sixth Amendment Right to Effective Assistance of Counsel may involve rights of the client that are not implicated for the prosecutor. However, some might argue that when it comes to the requirements of the attorney to avoid unknowingly encouraging false testimony, the criminal defense attorney has the same duties as an officer of the court.

Furthermore, should preparation of witnesses, who are not the defendant, differ for the defense attorney and prosecutor? In many respects the Criminal Justice Standards that are currently proposed do not differ significantly for defense attorneys and prosecutors. The question that must be considered is whether the prosecutor's duty as a minister of justice creates a responsibility that exceeds the criminal defense attorney's. Or rather, as officers of the court, they both share

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courtroom); *United States v. Smith*, 578 F.2d 1227, 1235 (8th Cir. 1978) (sequestered witnesses may communicate outside the courtroom unless specifically ordered not to); *United States v. Feola*, 651 F. Supp. 1068, 1130 (S.D.N.Y. 1987), *aff'd without opinion*, 875 F.2d 857 (2d Cir. 1989) (sequestered witnesses are free to discuss testimony outside of the courtroom, both before trial and after testifying, but may be cross-examined about such conversations if they tend to impact the witness's credibility or show bias).

the same duties to avoid assisting in false testimony regardless of their intent.

## **V. Proposed Standards on Witness Preparation<sup>89</sup>**

The current proposed Standards do not include any guidance on witness preparation. Therefore, the American Bar Association's Criminal Justice Section should consider including guidelines in the fourth edition of the Criminal Justice Standards that direct the criminal attorney to avoid conduct that may not be intended to influence the witness to testify falsely, but which by its nature may have the potential to create false testimony. A standard should be included in both the Prosecution Function as well as the Defense Function. The standard for witness preparation could be included in the sections on the relationship with victims and witnesses contained in both the Prosecution Function (Standard 3-4.2) and the Defense Function (Standard 4-4.4). However, it might be more effective to put the Standard immediately following all the standards on the relationships with the variety of participants so that it is clear that witness preparation includes all witnesses regardless of their relationship with the case.

The standards for prosecutors and defendants should be very similar. In the preparation of witnesses, there is really no ethical difference between the obligations of the prosecutor and the defense counsel. Differences between ethical obligations of prosecutors and defense counsel naturally stem from the constitutional rights of the defendant and the defense counsel's role in protecting those rights. In the area of witness preparation, the constitutional rights of the defendant are not implicated because no one would argue that the defendant has a constitutional right to present false testimony in his defense.<sup>90</sup> The only difference between the standards is the relationship the defense attorney has when preparing the defendant.

The standard should attempt to guide the practitioner by first pointing out the need to refrain from behavior that, even if not intended to produce false testimony, may in fact lead to false testimony. Additionally, the standard should contain a list of attorney conduct that could unintentionally produce false testimony.

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89. These proposed standards were the result of the author attending two of the Criminal Justice Standards Roundtables, those at Stetson University College of Law and Pace University College of Law.

90. See *Nix v. Whiteside*, 475 U.S. 157, 163 (1986).

A proposed standard for the Prosecution Function might include the following language:

When preparing a witness to testify, whether at trial, deposition, grand jury hearing, or any other hearing, a prosecutor should refrain from any conduct that may intentionally or unintentionally encourage, assist, or request a witness to testify falsely. In considering how to prepare a witness to testify, the prosecutor should consider whether the method the prosecutor is using unintentionally conveys to the witness that he or she should testify to facts other than what the witness, individually, believes to be true. The prosecutor should not:

1. discuss with a witness the law or defenses in the case before obtaining the witness's complete statement. Even after the witness has given a complete statement, in writing or orally, the prosecutor should not attempt to influence the witness's testimony by explaining the defendant's theory of what happened or the requirements of the law.
2. in a case in which identity is an issue, disclose to a witness any information about the current appearance of the defendant, unless extraordinary circumstances would require it.
3. prepare two or more witnesses together unless extraordinary circumstances would require it.
4. after the court has ordered sequestration of witnesses, disclose to a witness what previous witnesses have testified about. This would not preclude a prosecutor from asking about factual issues that have arisen based on the testimony of other witnesses but the prosecutor should not imply that other witnesses have testified differently than what the witness has previously indicated he or she would testify about.

A proposed standard included in the Defense Function might state:

When preparing a witness, other than the defendant, to testify whether at trial, deposition, or any other hearing, defense counsel should refrain from any conduct that may intentionally or unintentionally encourage, assist, or request a witness to testify falsely. In considering how to prepare a witness to testify, defense counsel should consider whether the method counsel is using unintentionally conveys to the witness that he or she should testify to something other than what the witness,

individually, believes to be true. The defense attorney should not:

1. discuss with a witness, other than the defendant, the law or the prosecution's theory of the case before obtaining the witness's complete statement. Even after the witness has given a complete statement, in writing or orally, defense counsel should not attempt to influence the witness's testimony by explaining the prosecution's theory of what happened or the requirements of the law.
2. prepare two or more witnesses, excluding the defendant, together unless extraordinary circumstances would require it.
3. after the court has ordered sequestration of witnesses, disclose to a witness what previous witnesses have testified about. This would not preclude defense counsel from asking about factual issues that have arisen based on the testimony of other witnesses, but defense counsel should not imply that other witnesses have testified differently than what the witness has previously indicated he or she would testify about.

### **Conclusion**

The issues surrounding witness preparation in the criminal context are numerous and complicated. Professional guidance is needed in this area of trial practice, which is routinely practiced but rarely addressed. The current Criminal Justice Standards do not currently provide the necessary guidance. Therefore, standards should be drafted to address the important gray areas of witness preparation to assist attorneys to navigate an ethical path.

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